

Dated 4.15.92  
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Before the  
**Federal Communications Commission** APR - 8 1992  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In Re Application of )

DAVID A. RINGER )

Application for Construction )  
Permit for a new FM Station, )  
Channel 280A, Westerville, )  
Ohio )

(F.W.)  
File No. BPH-911230MA

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APR 09 1992

TO: Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

FM EXAMINERS

David A. Ringer ("Ringer"), by his attorneys and pursuant to Section 1.45 of the Commission's Rules, hereby submits his opposition to the petition to deny filed by Ohio Radio Associates ("ORA") on March 26, 1992. For the following reasons, ORA's petition should be denied:

ORA requests that the application of Ringer be denied and dismissed because his proposed tower site is short-spaced to an existing station, allegedly in violation of the Commission's Rules. ORA argues that Ringer has violated Sections 73.207<sup>1</sup> and 73.215<sup>2</sup> of the Commission's Rules. However, ORA's interpretation of these rules and their applicability to Ringer's application simply is not correct.

ORA states that Ringer has violated Section 73.207 of the Rules because the location of the tower site from station WTTF-FM is short-spaced 6.84 km. ORA concludes that, since two other applicants in the proceeding are

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<sup>1</sup> 47 C.F.R. 73.207.

<sup>2</sup> 47 C.F.R. 73.215.

fully-spaced to all stations and pending applications, Ringer's application cannot be designated for hearing and should be immediately dismissed. ORA's basis for this conclusion is that when an "applicant in the proceeding is fully-spaced and no question is raised as to the availability or technical suitability of the fully-spaced site, the short-spaced applicant must be denied." (ORA Petition at p. 2) ORA then cites a series of cases that supposedly support its proposition.

ORA's use of Section 73.207<sup>3</sup> and the cases<sup>4</sup> ORA cites

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<sup>3</sup> Section 73.207 states in part: (a) Except for assignment made pursuant to §73.213 or 73.215, FM allotments and assignments must be separated from other allotments and assignment on the same channel (co-channel) and five pairs of adjacent channels by not less than the minimum distances specified in paragraphs (b) and (c) of this section ... The Commission will not accept applications for new stations, or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of § 73.213 or § 73.215.

<sup>4</sup> Madalina Broadcasting, Inc., 6 FCC Rcd 2508 (MMB 1991) is inapposite because the applicants' proposals were short-spaced in violation of §73.207. Valley Radio, 5 FCC Rcd 4875 (MMB 1990) dealt with an applicant's failure to file a timely amendment of right to correct its short-spacing. The Commission citing Donvan Burke, 104 FCC 2d 843 (1986) denied the applicant's request for waiver of § 73.207 because the request failed to raise any questions of fact regarding the technical feasibility or availability of sites for the allocation. Megamedia, 67 FCC 2d 1527 (1987) is inapposite because it dealt with an applicant that was successful in meeting the Commission threshold test to warrant a waiver of the § 73.207 minimum spacing Commission requirements. In North Texas Media, Inc. v. FCC, 778 F.2d 28 (D.C. Cir. 1985), the Court affirmed the FCC's refusal to waive the § 73.207 mileage spacing requirements. All of the cases cited by ORA are inapposite because they pertain to § 73.207 violations; whereas Ringer's engineering proposal was filed pursuant to § 73.215.

are not applicable to Ringer's application. In his application, Ringer acknowledged that his transmitter site was short-spaced under § 73.207, proposed a directional antenna and correctly requested authorization pursuant to Section 73.215 of the Rules. Section 73.215 states in part that:

The Commission will accept applications that specify short-spaced antenna locations (locations that do not meet the domestic co-channel and adjacent channel minimum distance separation requirements of § 73.207); provided that, such applications propose contour protection, ... with all short-spaced assignments, applications and allotments, and meet the other applicable requirements of this section....

ORA's liberal use of Section 73.207 and its cited cases are not applicable to the proposed engineering in Ringer's application. ORA's argument has absolutely no merit whatsoever and should be disregarded.

ORA next asserts that Ringer's proposed directional antenna and request to be processed under Section 73.215 is faulty and therefore warrants dismissal of his application. ORA argues that Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignment by Using Directional Antennas, 4 FCC Rcd 1681 (1989) ("Report and Order") stands for the proposition that directional antennas could only be utilized where fully-spaced tower sites are unavailable or had limited suitability. (ORA Petition at p. 3) ORA has grossly mischaracterized the Commission's Report and Order. Contrary to ORA's interpretation, the Report and

Order amended the Rules:

... to permit an applicant for commercial FM facilities to request the authorization of a transmitter site that would be short-spaced to the facilities of other co-channel or adjacent channel stations ... provided the service of these other licensees is protected from interference, whether by taking advantage of terrain elevation in the direction of the short-spaced station(s), by an appropriate reduction in operating facilities ... by use of directional antennas, or by any combination of these means.

Report and Order at 1681. Nowhere in the Report and Order does the Commission qualify the use of directional antennas to where fully-spaced tower sites are unavailable or have limited suitability.<sup>5</sup>

ORA next contends that Ringer's short-spaced application should not be granted under Section 73.215 because it is not in the public interest. (ORA Petition at p. 3) ORA's argument is two-fold. First, since there are technically suitable, fully-spaced tower sites available for Westerville, Ohio, no public interest justification can be found.<sup>6</sup> Secondly, ORA hypothesizes that Ringer proposed a short-spaced site solely for private economic interest. However, the rationale behind Ringer's decision to file under Section 73.215 is not at issue and is not pertinent to this proceeding. The fact of the matter is that the

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<sup>5</sup> ORA cites paras. 2, 5, 26, 30 of the Report and Order but they are not supportive of ORA's proposition.

<sup>6</sup> Naguabo Broadcasting Co., 6 FCC Rcd 4879 (1991) is relied upon by ORA to support this proposition but is inapposite because it pertains to a violation of § 73.207. Therefore, the first prong of ORA's "public interest" argument is irrelevant.

Commission, in 1987, initiated a proceeding to explore the possible use of directional antennas to allow assignment of FM broadcast facilities at short-spaced transmitter locations.<sup>7</sup> The driving force behind this inquiry was that the FM service had become extremely popular and that future improvement of FM service depended, in part, upon licensees having greater freedom in selection of antenna sites, including consideration of potential sites that did not meet minimum distance separation requirements as set out in § 73.207.<sup>8</sup> In its Report & Order and subsequent MO&O, the Commission amended its Rules to provide applicants with greater flexibility in selecting transmitter/antenna sites. By proposing a directional antenna system under Section 73.215, Ringer has simply done what the Commission has invited him to do.

ORA contends that Ringer cannot utilize Section 73.213(c)(1) of the Commission's Rules. ORA is wrong. The separation between Ringer's specified site and WTTF-FM complies with § 73.213(c)(1). As shown in Section 3.0 of Ringer's engineering statement, the proposed directional pattern restricts the effective radiated power in the arc toward WTTF to the equivalent of 3 kw at 100 meters above

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<sup>7</sup> Notice of Inquiry, MM Docket No. 87-121, 2 FCC Rcd 3141 (1987).

<sup>8</sup> Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, MM Docket No. 87-121, 6 FCC Rcd 5356 (1991) ("MO&O").

average terrain. Thus, ORA's argument regarding Ringer's alleged non-compliance with § 73.213(c)(2) is baseless.<sup>9</sup>

WHEREFORE, in light of the foregoing, Ringer requests that the Commission reject both ORA's petition to deny and its alternative request for a designated short-spacing

**CERTIFICATE OF SERVICE**

I, Lisa M. Volpe, a legal assistant in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 8th day of April 1992, copies of the foregoing were mailed, first class, postage paid to the following:

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